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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 DIOSELINA CONTRERAS,

12 Plaintiff,

13 vs.

14 MICHAEL J. ASTRUE, Commissioner  
of Social Security Administration,

15 Defendant.  
16

CASE NO. ED CV 06-00532 RZ

MEMORANDUM OPINION  
AND ORDER

17 Because the Court agrees with the first of Plaintiff's several arguments  
18 challenging the underlying step-five denial of benefits, it will reverse and remand.

19 Plaintiff's prior suit challenging a step-five denial of benefits, in case number  
20 ED CV 04-00946 RZ, ended with this Court's remand. Among other things, the remand  
21 required clarification of a particular doctor's opinion about Plaintiff's Residual Functional  
22 Capacity. Plaintiff's first argument here is that the Administrative Law Judge's new  
23 opinion, which again denied benefits at step five, did not clarify the doctor's opinion in the  
24 manner required by the Court. The pertinent part of the remand order was as follows:

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26 As pertinent here, the consulting internist Jason Hwang  
27 gave this assessment of Plaintiff's capability:  
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1 The claimant could be expected to stand and walk  
2 about six hours in an eight-hour workday, provided  
3 that she receive sufficient break time to prevent  
4 exacerbating her chronic low back pain, due to a  
5 disc injury. Likewise her ability to sit should be  
6 limited, but no[t] significantly so that she could be  
7 expected to sit [sic: sit] approximately six hours in  
8 an eight-hour workday, again provided that she  
9 receives sufficient break time to rest. . . .

10 [AR 202] The Administrative Law Judge stated that he had  
11 considered “and adopted” the work limits imposed by Dr.  
12 Hwang. But those limits contained an ambiguity: how long and  
13 how frequent should the breaks be, in order to allow Plaintiff to  
14 sit and stand as he allowed? The answer, if accepted, might  
15 have an impact on the vocational expert’s opinion as to the jobs  
16 available in the economy. Thus, it was important to understand  
17 more precisely the limitations which Dr. Hwang suggested.

18 An administrative law judge has a duty to develop the  
19 record beyond what is presented “only when there is ambiguous  
20 evidence or when the record is inadequate to allow for proper  
21 evaluation of the evidence.” *Mayes v. Massanari*, 276 F.3d 453,  
22 459-60 (9th Cir. 2001) (citing *Tonapetyan v. Halter*, 242 F.3d  
23 1144, 1150 (9th Cir. 2001)). *In doing so, the regulations*  
24 *empower him to have an updated consulting examination or to*  
25 *contact the physician for further information, as appropriate.*  
26 *20 C.F.R. § 404.1512(e) and (f). The ambiguity presented by*  
27 *Dr. Hwang’s assessment thus could be readily clarified.*

28 In this Court the Commissioner cites the undeniable  
proposition that it is the province of the Administrative Law  
Judge to resolve conflicts in the evidence. *Batson v.*  
*Commissioner*, 359 F.3d 1190, 1195 (9th Cir. 2004). But the

1 Administrative Law Judge did not understand there to be a  
2 conflict, and so he did not resolve it. It may be that, in fact,  
3 there is no conflict, but because of the ambiguity in Dr. Hwang's  
4 assessment that matter cannot be determined on the present  
5 record. And if there is a conflict, the Court cannot uphold the  
6 Commissioner's decision on the basis of the other evidence of  
7 record, because then it would be ignoring a potential important  
8 piece of evidence, and the substantial evidence standard requires  
9 the Court to consider the entire record. *Drouin v. Sullivan,*  
10 *supra.*

11 Accordingly, this matter is remanded to the Commissioner  
12 for further proceedings. *The Commissioner should contact Dr.*  
13 *Hwang as appropriate,* and conduct such other further  
14 proceedings as is deemed necessary.

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16 AR 256-58 (emphasis added).

17 But the record of the proceedings on remand indicates that Dr. Hwang was not  
18 contacted. Not only are there no further materials from the doctor, but there also is no  
19 reference to any attempt to contact him. Instead, the Administrative Law Judge sought the  
20 testimony of the medical expert who had testified in the prior administrative hearing. At  
21 least in the absence of a reasonably diligent *effort* to contact Dr. Hwang himself to obtain  
22 the mandated clarification, the Court finds this substitution inadequate to comply with the  
23 terms of the mandate and thus will remand again.

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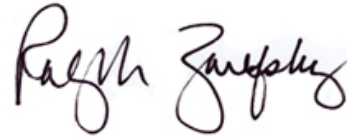
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1 In accordance with the foregoing, the decision of the Commissioner is  
2 reversed, and the matter is remanded for further proceedings consistent with this  
3 Memorandum Opinion.

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5 DATED: September 10, 2007

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RALPH ZAREFSKY  
UNITED STATES MAGISTRATE JUDGE